Supreme Court, U.S.
FILED
DEC 18 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-44

In The

Supreme Court of the United States

October Term, 1989

DENNIS BURNHAM,

Petitioner,

vs.

CALIFORNIA SUPERIOR COURT,
COUNTY OF MARIN,

Respondent.

FRANCIE BURNHAM,

Real Party In Interest.

**On Writ Of Certiorari To The
California Court Of Appeal
First Appellate District, Division Five**

BRIEF ON THE MERITS FOR REAL PARTY IN INTEREST

ROBERT L. NELSON
A Professional Corporation
35 Mitchell Blvd.
San Rafael, California 94903
(415) 479-1911

Trial Counsel For Real Party In Interest, Francie Burnham

JAMES O. DEVEREAUX
Attorney at Law
1821 Pacific Ave.
San Francisco, California 94109
(415) 885-0197

Counsel of Record for Real Party In Interest, Francie Burnham, in the Supreme Court of the United States

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QUESTION PRESENTED FOR REVIEW

Can California properly exercise *in personam* jurisdiction over a non-resident husband in a legal separation action where husband has been personally served with the petition and summons while actually present in California during one of several regular contemporaneous visits to California for a variety of purposes, including visitation with his children, attendance at business meetings and functions, and attending to other personal matters?

In this case, as in so many others, one or the other of the parties will be required to litigate the family law issues involved in a forum at the other end of the continent from where he or she lives. For more than a century, at least since this Court issued its opinion in *Pennoyer v. Neff*, 95 U.S. 714 (1877), it has been a fundamental principle of law in this country that a non-resident defendant who is physically present in the forum state and is there served with process is subject to the *in personam* jurisdiction of the courts of that state. In *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977) this court said: "We therefore conclude that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in International Shoe and its progeny." This case presents the question: what is the impact, if any, of that statement on the traditional rule that service of process upon a non-resident defendant while he is personally present within the forum state is a sufficient basis for subjecting him to the jurisdiction of that state?

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fourteenth Amendment, United States Constitution:

> SECTION I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of

> the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Code of Civil Procedure, Section 410.10:

> A court of this state may exercise jurisdiction on any basis not inconsistent with the constitution of this state or of the United States.

California Civil Code Section, Section 4503:

> A proceeding for dissolution of the marriage or for legal separation may be commenced by filing in the superior court a petition entitled "In re the marriage of. . . .and. . . ." which shall state whether it is a petition for the dissolution of the marriage or a legal separation. A copy of the petition together with a copy of a summons in form and content approved by the Judicial Council shall be served upon the other party to the marriage in the same manner as service of papers in civil actions generally.

STATEMENT OF THE CASE

Dennis Burnham (Husband) and Francie Burnham (Wife) were married in West Virginia in 1976. They moved to New Jersey in 1977 where they resided until July of 1987 when they separated by mutual agreement (Doc. 6, 3-17-88 Affidavit, Par. 2)[1]. During these years

[1] Reference to record material that is not included in the Joint Appendix is referred to as "Doc" followed by the docket

(Continued on following page)

they had two children, Rachel, born October 30, 1979, and Ari, born August 11, 1985 (JA 5, 11-12). In connection with their separation it was mutually agreed that the wife and children would move from New Jersey to California where wife had lived prior to her marriage to husband (JA 17-18, Doc. 6, Aff. Par. 9, 12, 14, 15, 19). Husband, who maintained control over the parties' money (Doc. 6, Aff. Par. 23), agreed to pay the expenses relating to the move and it was also agreed that wife would take furniture and furnishings which constituted a portion of the marital property (Doc. 6, Aff. Par. 33, 34, 43). A few days before the wife and children left for their new home in California, husband and wife signed a marital settlement agreement that had been prepared by a New Jersey attorney who had been a boyhood friend of husband's and who had agreed to serve as an impartial mediator in attempting to assist husband and wife in reaching an agreement regarding the termination of their marriage and the incidents relating thereto (Doc. 6, Aff. Par. 15, 16, 24, 25, 40). The validity and enforceability of this purported agreement is in dispute between the parties, it being wife's position at all times that husband procured her signature on the agreement through fraud, duress and undue influence. Further in connection with their separation, husband and wife agreed that wife would be the plaintiff or petitioner in a marital dissolution proceeding based upon the ground of "irreconcilable differences" (Doc. 6, Aff. Par. 15, 30, 40, 47). In the days

(Continued from previous page)

number that corresponds to the particular item as set forth in the Chronological List of Relevant Docket Entries included in the Joint Appendix at page 1.

preceding wife's signing the above-mentioned marital settlement agreement, husband several times threatened to "slap a restraining order" on her to prevent the wife and children from moving to California unless wife signed the agreement that husband and his attorney friend had prepared (Doc. 6, Aff. Par. 20, 24, 25, 28, 37). Wife signed the agreement on July 9, 1987, and on July 14, 1987, husband drove the wife and children to the airport in New Jersey where, using airplane tickets husband had previously purchased for them, they boarded a plane and flew to their new home in California (Doc. 6, Aff. Par. 19, 40, 42).

On October 21, 1987, notwithstanding the parties' agreement that wife would be plaintiff in an "irreconcilable differences" dissolution Petition, husband filed an action for divorce in New Jersey on the ground of "desertion". In his petition husband requested that the court incorporate the agreement previously signed by husband and wife. Upon filing of his Petition husband did not obtain the issuance of a Summons and did not attempt to have the Petition and Summons served upon wife. Thereafter, when wife learned of husband's New Jersey "desertion" Petition, she demanded that he withdraw it and honor their prior agreement concerning an "irreconcilable differences" divorce. She did not ever merely request that husband delay service of the New Jersey proceedings upon her. Although husband orally agreed to withdraw his petition and honor the prior agreement relating to an "irreconcilable differences" divorce, he did not do so and, when wife realized that she could not trust husband to honor his prior agreement, she engaged a California

attorney who filed an action for legal separation in California on January 5, 1988.

Later in January, husband was in Southern California on business and had made plans to travel to the San Francisco Bay Area to see his children after concluding his business in the Los Angeles area. On January 18, 1988, husband telephoned wife from his sister's home in the Los Angeles area and told her that he had received a phone call from his New Jersey office informing him that his New Jersey business partner had accepted California court papers on his behalf (JA 18). Three days later on January 21, 1988, husband arrived in the San Francisco Bay Area to see his children. That day he took them to the park and the next day, after conducting some business, he came to take Rachel for the weekend in San Francisco. On Sunday morning January 24, 1988, husband brought Rachel home and then spent some time with Ari at a local playground. Later, as he was preparing to leave wife and children's home, he was served with a Summons and a copy of wife's Legal Separation Petition by a friend who was visiting the wife and children (JA 19). On January 30, 1988, wife was served with a New Jersey Summons and a copy of husband's New Jersey "desertion" Petition (Doc. 6, Aff. Par. 55).

On several occasions prior to the weekend when he was served with wife's petition in Mill Valley, California, husband had traveled to California from New Jersey. On the weekend of October 23-25, 1987, husband had conducted a business seminar in the Napa Valley and he took Rachel with him for the weekend. Husband apparently remained in California during the next week because, on the following Friday, October 30, 1987, he attended

Rachel's birthday party after spending the day doing business in the San Francisco area (JA 18). Subsequent to being served on January 24, 1988, husband has continued to travel regularly to California during which trips he has both visited his children and attended to his own personal and business interests (JA 19-20).

After being served with husband's New Jersey Petition and realizing that husband had no intention of honoring the parties' agreement relating to an "irreconcilable differences" divorce, wife appeared through counsel in the New Jersey proceeding and sought to quash service of the Summons upon her and also to have the Petition and Summons dismissed. She filed a detailed affidavit in New Jersey which, in significant part, sought to support her position that the purported marital settlement agreement was invalid and unenforceable because it was procured through fraud, duress and undue influence (Doc. 6). On June 3, 1988, the New Jersey Superior Court granted wife's Motion to Quash and dismissed the New Jersey Complaint and Summons. In its decision on wife's Motion to Quash and Dismiss, although the New Jersey court did not resolve on the merits the parties' dispute as to the validity of the marital settlement agreement, it did make findings relating to that agreement (Doc. 12, Exhibit "A").

Since husband attempts to characterize the agreement in one way and wife perceives the agreement and the circumstances surrounding its negotiation and execution in a very different light, it might assist this Court to know the view of the New Jersey courts regarding that agreement. The New Jersey court found that, although husband *claimed* that his failure to earlier serve wife in

the New Jersey proceedings was wife's fault, "there is serious question as to Mr. Burnham's good faith or lack of same surrounding the Property Settlement Agreement signed by the parties on July 8, 1987" (Doc. 12, Exhibit "A", Statement of Reasons, p 2). It also found that, although the conduct of husband's New Jersey attorney-friend re-enforced wife's belief that he was acting as an impartial mediator, in fact, it appeared that he had been acting on behalf of husband (Id., pp 2, 3, 5). The court also found that "it is clear that there are some problems" with the terms of the agreement, particularly in that it provided for an unequal distribution of the marital assets in favor of husband and that there was "absolutely no indication that Mr. Burnham was required to make a full and complete disclosure of the true value of his family business interests. In fact, it appears that Ms. Burnham had no current knowledge regarding the true value of the major marital assets" (Id., pp 3-5). It was also concluded that husband was in a "vastly superior negotiating position at the time of the Agreement", and that "there is a serious question as to whether or not Mr. Burnham was acting in good faith when the parties negotiated to resolve their differences as set forth in the July 7, [sic] 1987, Agreement"(Id., p 5). The court further found that wife "was anxious to move to California but could not leave with the children until the Agreement was finalized" and that there was support for wife's contention that she viewed the signing of the Agreement as a "take it or leave it" proposition (Id., p 7). The court determined that "the burden of inconvenience should be balanced in favor of Ms. Burnham and the children" and that "the

more appropriate forum for litigating this matter is in California . . . " (Id., pp 7, 10).

Subsequent to the above decision husband filed a second divorce Petition in New Jersey and that Petition was similarly dismissed in an Order dated October 14, 1988. Husband appealed both Superior Court Orders dismissing his divorce actions and both Orders of Dismissal were upheld on appeal in a decision that determined, in part, that the trial court's Orders were "grounded in the belief that plaintiff [husband] had deliberately and unfairly manipulated defendant [wife] into moving to California so that he could bring his divorce action in New Jersey where it would be the most convenient for him and most inconvenient for defendant . . . ." The Appellate decision held "we affirm both Orders under review substantially for the reasons stated by Judge Graves of the Chancery Division, Family Part in his detailed and comprehensive statement of reasons filed with the Order of June 3, 1988." (The full text of the New Jersey appellate decision is set forth in Appendix I to this Brief.)

On April 12, 1988, husband filed a Motion to Quash service of the Summons in the California proceedings initiated by wife on the ground that California lacked *in personam* jurisdiction over him. In response to that motion wife filed a declaration which attached and incorporated by reference the affidavit she had filed in New Jersey in support of her Motion to Quash and Dismiss the New Jersey proceedings (Doc. 6). In opposition to husband's Motion to Quash, wife argued that California did have personal jurisdiction over husband and that it would be a hardship for wife to be required to litigate the marital

separation issues in New Jersey (Doc. 8). On September 8, 1988, the California Superior Court denied husband's Motion to Quash, and found that it had jurisdiction as to marital status but had no personal jurisdiction over husband (JA 21-22).

On September 16, 1988, wife filed a Motion for Reconsideration of the Superior Court's Order, taking the position that the fact that husband was personally served with the Petition and Summons while he was actually present in California was a sufficient basis for California to exercise *in personam* jurisdiction over husband and, further, that if it is a requirement of the exercise of *in personam* jurisdiction that husband have sufficient "minimum contacts" with California, the evidence presented to the California Superior Court established minimum contacts sufficient to support California's exercise of personal jurisdiction over husband (Doc. 12). In response to wife's Motion, husband filed a declaration that set forth certain contacts that he did not have with California but which did not controvert the facts set forth in wife's prior declaration (Doc. 15). On October 5, 1988, California Superior Court entered an Order denying husband's Motion to Quash in its entirety, finding that it "has jurisdiction, both *in rem* and *in personam*, over the subject matter and the parties, respectively" (JA 26). Husband then moved for reconsideration of the October 5, 1988, Order and, after receiving wife's legal Memorandum and Declaration In Response thereto and husband's reply and after hearing argument of counsel, the Superior Court issued an Order on October 31, 1988, denying husband's Motion for Reconsideration (JA 33).

On April 7, 1989, the California Court of Appeal denied husband's Petition for Writ of Mandate (JA 34-35) and, on June 8, 1989, the California Supreme Court denied husband's Petition for Review of the Court of Appeal decision.

SUMMARY OF ARGUMENT

The line of cases beginning with *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) recognized that a non-resident defendant's "presence" is a traditional basis of *in personam* jurisdiction. Thus, California's exercise of jurisdiction over husband in this case is consistent with the "standards of International Shoe and its progeny" as referred to in *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977).

This case does not involve "transient presence" because, as the state of domicile of the wife and children, California has a substantial interest in and connection with the subject matter of this litigation and the substantial rights and interests of the wife and children are implicated. Further, over the course of a substantial period of time husband has established a pattern of regular and continuing visits to California in which he attends to his personal business and affairs as well as visiting with his children. Husband helped create the interstate family relationship which exists by fostering the relocation of his wife and children to California, knowing at the time that his marriage to wife was over, knowing that judicial proceedings to formalize that termination and resolve all of the incidental issues was contemplated but had not yet commenced and knowing that wife intended

to be the plaintiff in an "irreconcilable differences" divorce. Husband had "fair warning" of the possibility of his being haled before a California court both because he sent his wife and children to live in California before contemplated judicial proceedings had been initiated and because, prior to his traveling to Mill Valley, California where he was served with process in this action, he was informed by his New Jersey business partner that wife had initiated California proceedings and had set in motion the procedures required to effect service of process upon husband.

Husband's contacts and purposeful activities with and in the state of California are sufficient to support the exercise of *in personam* jurisdiction over him by that state. He makes frequent regular trips to California which began prior to his being served with process in wife's legal separation action and have continued subsequent to that time. During these various trips to California husband has availed himself of both public and private facilities in the state of California and has derived tax and other benefits from his California activities.

An evaluation and balancing of the various important interests that this Court has recognized as bearing upon the propriety of a state court's exercising jurisdiction over a non-resident defendant supports the exercise of jurisdiction in this case. California's interests in adjudicating the dispute and in the economic and emotional health, welfare and security of its domiciliaries are of substantial importance in this case as are the interests of the wife and children of obtaining a complete and expeditious resolution of all the family law issues in a convenient forum. Recognition of California's right to exercise

jurisdiction in this matter will foster the most efficient and orderly resolution of the issues presented and will advance substantive social policies relating to family law matters. At the same time exercise of jurisdiction will not result in any undue burden being placed upon husband, particularly where he has made no showing in the record of any actual burden on him and, in fact, has been able to participate quite substantially in the litigation of jurisdictional issues raised in this action.

Finally, a determination that California, as the domicile of one of the separated spouses, has jurisdiction to adjudicate all of the involved family law issues raised in this case is eminently reasonable under all of the facts and circumstances, particularly where husband has been served with process while present in California on one of his many trips to that state and where all of the requirements of procedural due process have been met.

ARGUMENT

CALIFORNIA STATUTORY JURISDICTION

Section 410.10 of the California Code of Civil Procedure empowers California courts to exercise jurisdiction on any basis or contact not denied them by the California or United States Constitutions. See California Judicial Council Comment to Cal. Code Civ. Proc. Section 410.10 (West 1973). The California statute permits its courts to exercise jurisdiction over an individual on one or more of several bases, including "Presence" and "Other relationships to the state which make the exercise

of judicial jurisdiction reasonable." Id. The California Judicial Council Comment further states:

> "Other recognized bases include: . . . (3) Judicial jurisdiction for divorce of persons one or both of whom are domiciled in this state or have such other relationship to this state as would make it reasonable for the state to dissolve their marriage. (4) Judicial jurisdiction over other proceedings relating to status, such as judicial separation, annulment, support, adoption, or custody, of persons who are domiciled or present in this state, or have such other relationships to this state as would make it reasonable for the state to hear and determine such action.
>
> * * *
>
> One basic principle underlies all rules of jurisdiction. This principle is that a state has power to exercise jurisdiction over a person . . . if the person's relationship to the state is such as to make the exercise of such jurisdiction reasonable under contemporary standards. (See, e.g., *International Shoe Co. v. State of Washington, supra*; Restatement (Second), [sec.] 24.) This relationship includes all physical and non-physical circumstances which may serve to link a person with a state."

DEVELOPMENT OF JURISDICTIONAL PRINCIPLES

In *Pennoyer v. Neff*, 95 U.S. 714 (1877) this court endorsed two "well established principles of public law respecting the jurisdiction of an independent State over persons and property." Those principles were (1) that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory and (2) that no State can exercise direct jurisdiction and authority over persons or property without its territory.

Mr. Justice Field, speaking for the Court, quoted from *Picquet v. Swan*, 5 Mas. 85, as follows:

> "Where a party is within a territory, he may justly be subject to its process, and bound personally by the judgment pronounced on such process against him."

Thus was born the now traditional rule that the physical "presence" of an individual defendant within the forum state when he is served with process is a proper basis for the exercise by that state of *in personam* jurisdiction over him.

Apparently, the first case in which this Court actually applied this jurisdictional rule in a true "transient presence" situation was in *Fauntleroy v. Lum*, 210 U.S. 230 (1908). During the next 68 years the courts

> "struggled to make the existing law responsive to a set of radically changed circumstances by relying on such twists, turns and legal fictions as they could muster. Thus, through artificial interpretations of "presence" and "consent", courts substantially expanded their powers over nonresidents until, as a pragmatic matter, a new set of principles emerged." Friedenthal, *A Comment On The Impact of Shaffer v. Heitner In The Classroom*, Vol. 1978 Washington U. L. Q. 319, 321 (1978)

See also Werner, *Dropping The Other Shoe: Shaffer v. Heitner And The Demise Of Presence-Oriented Jurisdiction*, 45 Brooklyn L. Rev. 565, 575. This Court equated incorporation within the state or maintaining its principal place of business within the state with corporate presence within the state and/or presumed consent to the state's jurisdiction. See Brilmayer et. al., *A General Look At General*

Jurisdiction, 66 Texas L. Rev. 721, 733-735 (1988). Other cases held that "doing business within the state" could be deemed "presence", thus providing a proper basis for exercising *in personam* jurisdiction over a non-resident corporate defendant. See *International Harvester Co. v. Kentucky*, 234 U.S. 579 (1914); *Philadelphia & Reading R. Co. v. McKibbin*, 243 U.S. 264 (1917).

Ultimately, in 1945 this Court issued its seminal opinion in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) in which it held that "due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' *Milliken v. Meyer*, 311 U.S. 457, 463, 85 L ed 278, 283, 61 S. Ct. 339, 132 ALR 1357." 326 U.S., at 316. This court thus expanded the basis upon which a state can exercise *in personam* jurisdiction over a non-resident defendant to include, in addition to the defendant's actual presence within the state, certain "minimum contacts" of the defendant with the forum state such that, when evaluated in terms of their "quality and nature . . . in relation to the fair and orderly administration of the laws" (326 U.S., at 319), the exercise of *in personam* jurisdiction will not offend "traditional notions of fair play and substantial justice." The very language used in *International Shoe* appears to establish that the Court recognized the defendant's *presence* within the state as a proper basis of jurisdiction and, further, recognized that other factors would also form a proper basis for the exercise of *in personam* jurisdiction, as a supplement to the presence basis.

Fourteen years later in *New York v. O'Neill*, 359 U.S. 1 (1959), this Court reaffirmed the principle that the actual, physical presence of an individual non-resident defendant within the forum state is a proper basis upon which that state can exercise *in personam* jurisdiction. Mr. Justice Frankfurter, speaking for the Court, stated: "However, the Florida courts had immediate personal jurisdiction over respondent by virtue of his presence within that State." 359 U.S., at 8-9.

During the next 30 years the opinions of this Court interpreting and applying the analytical framework adopted in *International Shoe* involved, for the most part, the attempt to exercise *in personam* jurisdiction over non-resident *corporate* defendants, which were served with process either constructively or personally outside the boundaries of the forum state. In the one case where the corporate agent was personally served within the boundaries of the forum state, this court upheld the exercise of *in personam* jurisdiction over the corporate defendant, even though the cause of action sued upon did not arise in the forum state and did not relate to the corporate defendant's activities in that state, because the corporation had been carrying on a continuous and systematic, though limited, part of its general business in the forum state. The court stated:

> "Today if an authorized representative of a foreign corporation be physically present in the state of the forum and be there engaged in activities appropriate to accepting service or receiving notice on its behalf, we recognize that there is no unfairness in subjecting that corporation to the jurisdiction of the courts of that state

> through such service of process upon that representative." *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 444 (1952).

In 1957, the Court seemed to recognize and confirm that the holding in *International Shoe* was intended to supplement and expand the traditional "presence" basis of jurisdiction to cover certain non-resident defendants who were not present, when the court stated:

> "Since Pennoyer v. Neff, 95 U.S. 714, 24 L ed 565, this Court has held that the Due Process Clause of the Fourteenth Amendment places some limit on the power of state courts to enter binding judgments against persons not served with process within their boundaries." *McGee v. International Life Ins. Co.*, 355 U.S. 220, 222 (1957).

The court noted that there was a clearly discernable trend toward expanding the permissible scope of state jurisdiction over foreign corporations and other non-residents. In *McGee* the contacts were indeed minimal but the Court upheld the exercise of *in personam* jurisdiction over the non-resident corporate defendant on a finding of a "substantial connection" between the contract which was the basis of the suit and the forum state (355 U.S., at 223).

In *Hanson v. Denckla*, 357 U.S. 235 (1958), the court refused to uphold the exercise of *in personam* jurisdiction over the corporate trustee and other non-residents because those defendants did not have the requisite "minimal contacts" with the forum state and because the case did not involve "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." 357 U.S., at 253.

In *Shaffer v. Heitner*, 433 U.S. 186 (1977) this court issued ar opinion that forms the basis of husband's challenge to the exercise of California jurisdiction over him in this case. *Shaffer* technically involved an exercise of *quasi in rem* jurisdiction; indeed, a particularly harsh form of *quasi in rem* jurisdiction. See Karst, *The Supreme Court, 1976 Term*, 91 Harv. L. Rev. 151, 158, n. 36. Due to the unusual and harsh provisions of the Delaware statutory provision upon which jurisdiction was asserted, the case really involved a disguised assertion of personal jurisdiction over the absent non-resident defendants. Important to the Court's analysis was the fact that the express purpose of the Delaware statute was to compel the defendant to enter a personal appearance, in that Delaware law precluded any defense on the merits unless the defendant entered a general appearance "thus submitting to full in personam liability." 433 U.S., at 209, n. 33. The Delaware Supreme Court had interpreted the sequestration statute as not permitting the defendant to appear specially and defend on the merits with liability limited to the value of the seized property. See *Sands v. Lefcourt Realty*, 35 Del. Ch 340, 117 A. 2d 365 (1955). Given the fact that *Shaffer*, in effect, involved personal jurisdiction over the non-resident defendants, the notion that the standards set forth in *International Shoe* and its progeny should be applied is not startling.

In the context of the foregoing development of the law, the questions to be resolved in the instant case are (1) whether the standards of *International Shoe* and its progeny are to be applied in evaluating California's exercise of *in personam* jurisdiction over husband under the facts of this case and, (2) if so, (a) what are those standards and

(b) do they support the exercise of *in personam* jurisdiction over husband under the facts of this case?

THE FACTS OF THIS CASE DO NOT PRESENT AN ISSUE OF "TRANSIENT PRESENCE"

Professor Ehrenzweig has defined the "transient rule" of personal jurisdiction as the exercise of *in personam* jurisdiction over an individual non-resident defendant based solely upon service of process upon that defendant when he or she is physically present within the forum state, where neither the plaintiff nor the defendant resides in the forum state and the forum state has no connection with the cause of action. See Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 Yale L.J. 289 (1956). The facts of this case do not fit within such "transient rule" especially because California is the state of domicile of the wife and children.

Certainly California has a "connection" with the subject matter of the litigation based upon that domicile. Further, under the facts of this case, husband's presence in California has not been transitory, fleeting, momentary, casual, or fortuitous. Wife testified in a sworn declaration that husband made at least one trip to California every year during the eleven years that the parties were married prior to their separation, except for one year. Prior to the California trip during which husband was served in January of 1988, he had made at two visits to California of substantial duration in which he attended to his

personal business and affairs and in which he also took the opportunity to visit with his children. During the January 1988 trip to California, he traveled directly from New Jersey to Los Angeles where he spent several days attending to business and visiting relatives. Then, prior to returning to New Jersey, he traveled to the San Francisco Bay Area where he both visited with his children and conducted some business.

HUSBAND'S "PRESENCE" IN CALIFORNIA UNDER THE EVIDENCE IN THIS CASE IS A PROPER BASIS UPON WHICH CALIFORNIA MAY EXERCISE IN PERSONAM JURISDICTION OVER HIM

Although the "presence" basis of asserting *in personam* jurisdiction has engendered a virtual maelstrom of criticism, it has not been without its supporters. See Maltz, *Sovereign Authority, Fairness And Personal Jurisdiction: The Case For The Doctrine Of Transient Jurisdiction*, 66 Washington U. L. Q. 671 (1988); Glen, *An Analysis Of "Mere Presence" And Other Traditional Bases Of Jurisdiction*, 45 Brooklyn L. Rev. 607 (1979). In any case, whether "mere" presence is a sufficient basis for the exercise of *in personam* jurisdiction or whether presence is always sufficient need not be decided in this case.

Husband was not served with the California Petition and Summons by surprise or chance. Prior to traveling to the San Francisco Bay Area and while still in Southern California, husband learned from his business partner that wife had filed a California Petition and that the partner had accepted service in husband's behalf. Thus, husband had fair warning, prior to his trip to Mill Valley, California, that wife had initiated California proceedings

and that he might very well be served. Subsequent to his being served in January of 1988, husband has continued his regular trips to California to attend to his own personal and business affairs, and to visit his children (JA 18-20; 27-28).

The California Judicial Council Comment to Section 410.10 of the California Code of Civil Procedure states, in part: "A state has power to exercise judicial jurisdiction over an individual who is physically present within its territory, whether permanently or temporarily, if at that time he is properly served with process." One can be "temporarily" present without his presence being transitory, momentary or fortuitous. Under the facts of this particular case, husband was present in California temporarily on several distinct but regular occasions. If a categorical rule that presence is, *per se*, a proper basis for the exercise of jurisdiction has the potential to lead to unfair results or abuses, then an equally categorical rule that presence is never a sufficient basis to support the exercise of jurisdiction, without a consideration of all the facts and circumstances of the case, is similarly unfair. Even the proposed revisions to Restatement of the Law, Second, Conflict of Laws, Section 28, do not suggest that presence be abrogated as a proper basis of the exercise of *in personam* jurisdiction, but simply propose that a state has the power to exercise jurisdiction over an individual who is present within its territory *unless* his relationship to the state "is so attenuated as to make the exercise of such jurisdiction unreasonable." This is consistent with the California Judicial Council Comment provision that judicial jurisdiction may be exercised over an individual on the bases of presence and "other relationships to the

state" which make its exercise "reasonable." Comment b to Section 28 of the Restatement suggests that jurisdiction would be appropriate if "there is some connection between the state and the particular transaction involved" or if there is some "special circumstance" that makes the exercise of jurisdiction reasonable. It is suggested that the facts of this case do involve such a "connection" and "special circumstance" in that California is the state of domicile of the wife and children and has an interest in the subject matter of the litigation. Further, husband helped create the "California connection" with this litigation and has created his own relationship with California by his own affirmative acts. Also, it has been observed, presence will often signal other relationships with the forum and the litigation which will be adequate to support the exercise of jurisdiction. (See von Mehren and Trautman, *Jurisdiction To Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121, 1137 (1966); Karst, *supra*, 91 Harv. L. Rev. at 160; Bernstine, *Shaffer v. Heitner: A Death Warrant For The Transient Rule Of In Personam Jurisdiction*, 25 Vill. L. Rev. 38, 62 (1979). The presence of a non-resident defendant in the forum state when he is personally served with process has been a traditional basis for the exercise of *in personam* jurisdiction over that defendant for more than a century. Any harshness in the "presence" rule can be ameliorated in a proper case where such facts and circumstances obtain by a decision imposing appropriate limitations on the rule. There is nothing about the facts of this case that show any harshness such that should lead the Court to abandon that traditional rule of judicial jurisdiction. Instead, it is respectfully submitted, it is appropriate for this Court to reaffirm the

traditional rule that the actual physical presence of a non-resident individual defendant within the forum state, when he is personally served with process, is a sufficient basis for the exercise of *in personam* jurisdiction over him, as long as under all of the facts and circumstances of the case the exercise of such jurisdiction is reasonable. As shall presently be shown, the exercise of jurisdiction over husband under the facts and circumstances of this case is reasonable.

EXERCISE OF IN PERSONAM JURISDICTION OVER HUSBAND IN THIS CASE COMPLIES WITH THE "FAIR PLAY AND SUBSTANTIAL JUSTICE" STANDARD SET FORTH IN INTERNATIONAL SHOE

A defendant's "presence" is a basis for exercising *in personam* jurisdiction under the opinion in *International Shoe* and thus meets the "standards set forth in *International Shoe* and its progeny." (*Shaffer v. Heitner, supra*, 433 U.S., at 212). That *International Shoe* and its progeny intended to supplement rather than replace "presence" as a jurisdictional basis by setting up an alternative methodology for establishing jurisdiction over non-resident defendants who are "not present" within the forum state is illustrated by the opinions of this Court in *New York v. O'Neill, supra*, and *McGee v. International Life Ins. Co., supra*. In *McGee* the Court emphasized the limit imposed by the Fourteenth Amendment on state court power to enter binding judgments against "persons not served with process within their boundaries." 355 U.S., at 222. Subsequent to its opinion in *International Shoe* this Court has twice upheld jurisdiction over non-resident defendants who were present within the forum state and has

never rejected jurisdiction over a present defendant. See *Perkins v. Benguet Mining Co., supra,* and *New York v. O'Neill, supra.*

Regardless whether the exercise of jurisdiction over husband can be sustained on the basis of the foregoing arguments, it is respectfully submitted that California's exercise of jurisdiction under the facts of this case meets the "standards set forth in International Shoe and its progeny." *Shaffer v. Heitner, supra,* 433 U.S., at 212. That *Shaffer's* reference to the "standards" of *International Shoe* and it's progeny was a reference to "traditional notions of fair play and substantial justice" seems clear from the following statements in *Shaffer*:

> "We think that the time is ripe to consider whether the standard of fairness and substantial justice set forth in *International Shoe* should be held to govern actions in rem as well as in personam." 433 U.S., at 206.
>
> "The case for applying to jurisdiction *in rem* the same test of 'fair play and substantial justice' as governs assertions of jurisdiction *in personam* is simple and straightforward." 433 U.S., at 207.
>
> "We believe, however, that the fairness standard of *International Shoe* can be easily applied in the vast majority of cases." 433 U.S., at 211.

International Shoe inaugurated the "minimum contacts" methodology as a way of analyzing whether the exercise of jurisdiction over the defendant in that case was concomitant with concepts of fair play and substantial justice. *McGee v. International Life Ins. Co., supra,* also followed this methodology and in addition held that the acts of defendant in mailing to the insured in California a contract having a "substantial connection with that State"

(355 U.S., at 223) and accepting premium payments mailed to it by the insured from California were contacts which, while minimal, were sufficient to support the exercise of *in personam* jurisdiction over the non-resident defendant.

Hanson v. Denckla, supra, introduced to the jurisdictional inquiry the concept of "affiliating circumstances" (357 U.S., at 246) without which the courts of a state may not exercise *in personam* a jurisdiction over a non-resident defendant. In determining whether a defendant has "sufficient affiliation" (357 U.S., at 250) with the forum state, "it is essential . . . that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." 357 U.S., at 253.

Shaffer, itself, after noting that "Mechanical or quantitative evaluations of the defendant's activities in the forum could not resolve the question of reasonableness" suggested that "the relationship among the defendant, the forum, and the litigation" (433 U.S., at 204) should be the central concern of the inquiry into whether it is fair and reasonable to exercise personal jurisdiction over the non-resident defendant. Thus were the "minimum contacts" methodology set forth in *International Shoe* and *McGee,* and the "affiliating circumstances" and "purposeful availment" analysis employed in *Hanson v. Denckla* recognized in *Shaffer.* Each of these analytical concepts or methodologies has as its goal the determination of the fairness, justness, and reasonableness of exercising personal jurisdiction under the particular facts of each case.

The post-*Shaffer* opinions of this Court have continued the development of analytical techniques designed to determine whether it is fair and reasonable for a state to exercise personal jurisdiction over a given defendant in a particular factual setting. Thus, in *Kulko v. California Superior Court*, 436 U.S. 84 (1978) this Court, for the first time, applied the foregoing analytical framework of the *International Shoe* line of cases and stated that the existence of personal jurisdiction over the defendant depends on "a sufficient connection between the defendant and the forum State as to make it fair to require defense of the action in the forum." 436 U.S., at 91. Further, the Court acknowledged that "the interests of the forum State and of the plaintiff" are relevant considerations although "an essential criterion in all cases is . . . the 'quality and nature' of the defendant's activity . . . ." 436 U.S., at 92.

In *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980) this court refused to approve the exercise of *in personam* jurisdiction over the non-resident defendants because "we find in the record before us a total absence of those affiliating circumstances that are a necessary predicate to any exercise of state-court jurisdiction. [Defendants] carry on no activity whatsoever in Oklahoma. . . . They avail themselves of none of the privileges and benefits of Oklahoma law." 444 U.S., at 295. The court nourished the broadening analytical framework of the jurisdictional inquiry, noting that, while the burden on the defendant is always a primary concern, it will be considered in light of other relevant factors. Such factors include the forum state's interest in adjudicating the dispute; the plaintiff's interest in obtaining convenient and effective relief; the interstate judicial system's interest in

obtaining the most efficient resolution of controversies; and the shared interest of the several states in furthering fundamental substantive social policies. 444 U.S., at 292. The factors set forth in *World-Wide Volkswagen* were reiterated in *Burger King*, 471 U.S., at 477; and in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 113 (1987). The Court further noted that *International Shoe* stressed that the Due Process Clause insures not only fairness, but also the "orderly administration of the laws." 444 U.S., at 294. Foreseeability also is a relevant consideration; that is, whether "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." 444 U.S., at 297.

In *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984) the court reiterated its prior suggestions that the relationship among the defendant, the forum and litigation is an important focus of inquiry. 465 U.S., at 775. The opinion in *Keeton* also placed significant importance on the forum state's interest in holding the defendant answerable where a non-resident defendant engages in activities "relating to" the forum state. 465 U.S., at 776. The fact of plaintiff's residence in the forum state is also a relevant factor to be considered. "That is, plaintiff's residence in the forum may, because of defendant's relationship with the plaintiff, enhance defendant's contacts with the forum. Plaintiff's residence may be the focus of the activities of the defendant out of which the suit arises." 465 U.S., at 780.

The court has also recognized, in the post-*Shaffer* world, that it is fair and reasonable to permit a state to exercise *in personam* jurisdiction over a non-resident defendant where the defendant has "fair warning" that a

particular activity may subject him to the jurisdiction of the forum state and he nevertheless goes forward with such activity in spite of the fair warning. See *Burger King v. Rudzewicz*, 471 U.S. 462, 472; *Shaffer v. Heitner, supra*, 433 U.S., at 218 (Stevens, J., concurring). The "fair warning" requirement is satisfied if the defendant has purposefully directed his activities at residents of the forum state. *Burger King, supra*, 471 U.S., at 472; *Keeton, supra*, 465 U.S., at 774.

Thus it is clear that *Shaffer* and the opinions that came later, although they may not expand the circumstances in which state court jurisdiction may be exercised, do expand the analytical techniques employed by this court to determine, in a given factual setting, whether the exercise of jurisdiction is fair and reasonable.

AN EVALUATION OF HUSBAND'S CONTACTS AND PURPOSEFUL ACTIVITIES IN OR AFFECTING CALIFORNIA SUPPORTS THE EXERCISE OF JURISDICTION OVER HIM

The evidence adduced before the California courts indicates that, during the ten year period immediately preceding the commencement of wife's California legal separation action, husband regularly visited California at least once each year. Further, a few months before he was served with wife's Petition and Summons in the California proceedings, he had commenced a pattern of more frequent regular trips to California and he has continued that pattern of continuing visits to California after having been so served. During those visits he has visited with his sister and her family, he has attended business functions and engaged in other business related activities (even

conducting at least one business seminar in California in October 1987), and he has taken advantage of entertainment and tourist attractions and public facilities in California. Husband has testified that he has derived tax benefits from his activities in California and it can be reasonably inferred that he has derived other business benefits from his business functions and activities. It is clear that he has reaped benefits from the use of California's airport facilities, highways, hotels and restaurants. California is not just "any state" where husband was served.

Nor is jurisdiction predicated merely upon husband's presence in California when he was served, but is based upon all of his various activities in California while he was present in that state on various regular occasions as well as upon California's connection with this litigation. Although husband attempts to characterize his business activities in California as events he "simply arranged to attend" (Petitioner's Brief, p. 46) when he was coming to visit his children, the evidence in this case suggests otherwise. That evidence shows that husband began his habit of coming to California to attend business related seminars and functions many years before his family broke up (JA 28). The evidence further shows that in October of 1987 husband apparently spent a full week in California attending to business, visiting with his children only on the two weekends before and after that week of business activities (JA 18). Further, in January of 1988 husband spent several days in Southern California on business before finally traveling to the San Francisco area to visit his children on the weekend before flying home to New Jersey (JA 18-19). Perhaps the most accurate perspective

on husband's business activities in California is best established in his letter dated December 12, 1987, written in his own hand, informing wife of his plans to be in California in the ensuing months.[2] By way of example, this letter shows that husband's plans during January 1988, when he was served with process in wife's action, were to attend to his business affairs for a full two week period surrounding the weekend visitation with his children.

Although husband argues that his business activities in California should not be included in evaluating his "contacts" with California for jurisdictional purposes in this case, the evidence shows that on virtually all of his trips to California he has combined the several purposes of visiting his children, conducting business activities and, at least sometimes, visiting with other relatives. Thus, when one looks at husband's trips to California from the perspective of practical reality, one sees that there were not separate trips for business and personal purposes, on the one hand, and for visitation, on the other. Thus, it is not appropriate to try to separate or categorize husband's various California activities and to fit them into distinct pigeon holes. What is significant about husband's activities in California, it is respectfully

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[2] This letter is included in the record in this case although it is not included in the Joint Appendix. It is Exhibit H to wife's Affidavit dated May 17, 1988, which was filed in the New Jersey proceedings and attached and incorporated by reference in wife's Declaration in the California proceedings dated June 23, 1988, Doc. 6 in the Chronological List of Relevant Docket Entries in the Joint Appendix. For the Court's convenience the full text of this letter is set forth in Appendix II of this Brief.

suggested, is that they establish his frequent "presence" on several different occasions and the lack of any real burden on him of requiring him to litigate the family law issues in California. Such presence shows that husband did engage in affirmative activities by which he purposefully availed himself of the privilege of conducting activities within the state of California, pursuant to which he invoked the benefits and protections of its laws and it establishes minimum contacts with California which "may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice' *International Shoe Co. v. Washington*, 326 U.S., at 320, 90 L Ed 95, 66 S. Ct. 154, 161 ALR 1057." *Burger King Corp. v. Rudzewicz, supra*, 471 U.S., at 476. Those other factors include the lack of burden on husband, California's interest in adjudicating the dispute, wife's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of the controversy, and the shared interest of the states in furthering fundamental substantive social policies. "These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required." *Burger King, supra*, 471 U.S., at 477.

There are some situations in which one's relationship to or activities in the forum state, even though not always directly related to the subject matter of the litigation, may be sufficient to support the exercise of jurisdiction. See Brilmayer, *General Jurisdiction, supra*, 66 Texas L. Rev. at 741-743. Even though some of husband's activities in California do not relate directly to the subject matter of

the legal separation action, they do implicate the police powers and public facilities of that state. Those activities seem certainly to be relevant to the questions of convenience and reasonableness and, it is submitted, it is not unreasonable to allow California to exercise jurisdiction over husband where other relevant factors support the exercise of jurisdiction. By virtue of husband's presence and activities in California on various specific occasions, the Privileges and Immunities Clause of Article IV of the United States Constitution requires California to grant him a variety of rights, including the right to protection of the law and the right of access to the state courts. Thus, husband has voluntarily associated himself with California and has placed himself fully within the protection of California laws and within the sovereign authority of that state. See Maltz, *supra*, 66 Washington U.L.Q., at 698.

Husband consented to, and actively participated in, the establishment of a California domicile for his wife and children, knowing that he would have a continuing relationship with his wife and children after they had established their California domicile, knowing that his marriage to wife was being terminated and knowing that judicial proceedings to formalize that termination and adjudicate all the legal issues incident thereto were contemplated but had yet to be commenced. There is evidence in the record in this case that, prior to husband's assisting his wife and children in their move to California, he and wife had agreed that wife would be the plaintiff in divorce proceedings based on the ground of "irreconcilable differences."

All of the foregoing virtually compels the conclusions that husband engaged in affirmative actions by which he

purposely availed himself of the privilege of conducting activities in the state of California and invoked the benefits and protections of California law, that he participated in creating a situation which inevitably resulted in a relationship among husband, California, and the litigation, and that he should reasonably have foreseen or anticipated his being haled before a California court. The activities of husband in and relating to California are not random, fortuitous or attenuated. His contacts with California result directly from his own actions that created a "substantial connection" with that state. See *Burger King Corp. v. Rudzewicz, supra,* 471 U.S., at 475. "[W]here a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." Id, at 477.

AN EVALUATION OF THE INTERESTS INVOLVED IN THIS CASE SUPPORTS THE EXERCISE OF *IN PERSONAM* JURISDICTION OVER HUSBAND

> "[T]he time has come to slough off the ritualistic classifications through which judges still feel bound to think their hard way to realistic decisions.
>
> "Why should they not be free to consider jurisdiction at the outset in the complex of the parties' contacts with the forum state, the interests of the state concerned in the outcome, and a pervading concept of fair play to all parties?" Traynor, *Is This Conflict Really Necessary?*, 37 Texas L. Rev. 657, 660 (1959).

This Court has rejected "talismanic jurisdictional formulas." *Burger King, supra,* 471 U.S. at 485. The reasonableness of the exercise of jurisdiction over a non-resident defendant depends in each case on an evaluation of several factors, including the interests of the forum state, the interests of the plaintiff, the interest of the interstate judicial system in obtaining the most efficient resolution of controversies, and the shared interest of the several states in furthering fundamental substantive social policies. *World-Wide Volkswagen, supra,* 444 U.S., at 292; *Burger King, supra,* 471 U.S., at 477; *Asahi Metal Industry Co., Ltd., supra,* 489 U.S., at 113. The Due Process Clause of the Fourteenth Amendment insures not only fairness, but also the "orderly administration of the laws." *International Shoe, supra,* 326 U.S., at 319; *World-Wide Volkswagen, supra,* 444 U.S., at 294.

The forum state's interest in adjudicating the dispute is "unquestionably important", *Kulko v. California Superior Court, supra,* 436 U.S., at 98, and the plaintiff's interest in obtaining a convenient and effective forum are both important factors to be considered. *World-Wide Volkswagen, supra,* 44 U.S., at 292; *Keeton v. Hustler Magazine, supra,* 465 U.S., at 776; *Shaffer v. Heitner, supra,* 433 U.S., at 208. The fact that plaintiff is a resident of the forum state may be an important factor in the jurisdictional inquiry and may enhance the defendant's contacts with the forum since plaintiff's residence may be the focus of the defendant's activities relating to the forum state. *Keeton v. Hustler Magazine, Inc.,* 465 U.S., at 780. Indeed, plaintiff's contacts with the forum state may be so manifold that they will permit the exercise of jurisdiction over a non-

resident defendant when a jurisdictional basis might otherwise be lacking. *Calder v. Jones,* 465 U.S. 783, 788 (1984).

California not only has an interest in providing a forum and a procedure in this litigation, it also has an interest in the outcome which, particularly regarding the custody, support and property division issues, will have a profound effect upon its domiciliaries. The Due Process Clause of the Fourteenth Amendment should not be construed as depriving the forum state of the power to protect its citizens in their dealings with non-resident defendants simply on the ground that it would be more "convenient" for the defendant to be sued somewhere else. See *International Shoe, supra,* 326 U.S., at 323, 325. Jurisdictional rules may not be employed in such a way as to make litigation so gravely difficult and inconvenient that a party is at a severe disadvantage in comparison to her opponent. *Burger King, supra,* 471 U.S., at 478.

Can it be doubted that California, as the state of domicile of the wife and children, has a special interest in providing a forum and adjudicating the issues presented in this litigation? California has asserted its interest and New Jersey, the state of husband's domicile as well as the state of the prior marital domicile, has deferred to California, not just on a technicality of New Jersey law but in express recognition of California's legitimate interests. A fair reading of the New Jersey Superior Court decision (Doc. 12, Exhibit "A" pp. 6-10) shows, and the Appellate decision confirms, that New Jersey's deference to California was not limited to considerations under the Uniform Child Custody Jurisdiction Act. The New Jersey decisions appear to reflect that state's belief that the most efficient resolution of the issues will be in California and that

referring husband to a California forum will advance the substantive social policy of not fostering fraud, duress and undue influence in the negotiating of marital settlement agreements. This Court has also emphasized that "jurisdiction may not be grounded on a contract whose terms have been obtained through fraud, undue influence, or overweening bargaining power" . . . . *Burger King, supra,* 471 U.S., at 486.

What is efficient or "orderly" about allowing California to determine the marital status of husband and wife and to resolve custody issues, but then to require the parties to travel all the way across the country to litigate other issues presented by this litigation. Surely California has a strong interest in promoting a fair division of the marital property and in adjudicating issues relating to the support of its domiciliaries and keeping them off the public assistance registers. In that regard, it appears that California's interests may well be greater than New Jersey's. In asserting jurisdiction over husband, California cannot be accused in meddling in a dispute that does not concern it. California certainly has substantial interest in the economic and emotional health, welfare and security of its domiciliaries. See *Crouch v. Crouch,* 28 Cal.2d 243, 251, 169 P.2d 897 (1946).

The substantial interests of the wife and children are also implicated here. Clearly they have a legitimate interest in obtaining a convenient forum for the complete and expeditious resolution of the important issues that affect their lives. They have an interest in obtaining a stable and nourishing home environment which would be severely impaired if wife is required to shuttle between California and New Jersey to litigate some of the issues involved in

this case. As long as there is a real nexus between the circumstances giving rise to this litigation and the state of California and where the litigation involves the substantial interests of the wife and children, California should be deemed to have a sufficient interest in the litigation to permit it to exercise *in personam* jurisdiction over husband. Such a result would foster the orderly administration of the laws and the efficient resolution of the controversy, as well as fostering fundamental social policies.

EXERCISE OF JURISDICTION IN THIS CASE WILL NOT IMPOSE AN UNREASONABLE BURDEN ON HUSBAND

Although the burden on the defendant is a primary concern of the jurisdictional inquiry, that burden, to the extent that it actually exists, is to be considered in light of the other relevant factors previously set forth herein. Moreover, the burden on the defendant must be a real one. The courts should not allow abstract theoretical considerations to blind them to the factual realities of each case.

Husband has made no showing in the record in this case of any actual burden on him of having to litigate this matter in the courts of California. The truth is that he has participated quite substantially in the litigation of the jurisdictional dispute, by special appearance, without ever actually attending any of the several hearings. He has also engaged in a continuing pattern of regular visits to California over a substantial period of time and has derived significant tax and other benefits from those trips. Clearly, he can (and undoubtedly will) continue to

make his frequent trips to California to visit relatives, to engage in various business activities, to visit his children and to participate in this litigation without suffering any inconvenience or burden that rises to the level of being unreasonable. Inconvenience to the defendant does not necessarily amount to the denial of due process. *McGee v. International Life Ins. Co., supra,* 355 U.S., at 224; *Burger King Corp. v. Rudzewicz, supra,* 471 U.S., at 486. When a connection has been established between the defendant and the forum, often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even serious burdens on the defendant. *Asahi Metal Industry Co., Ltd. v. California Superior Court, supra,* 480 U.S. at 114.

However it may have been in former times, modern technological means of transportation and communication have greatly lessened the burden on a non-resident husband if he is required to litigate family law issues in the state of domicile of his wife and children. This truth was recognized even decades ago (see e.g. *Hanson v. Denckla, supra,* 357 U.S., at 250, 251), long before the inauguration of the "Express Mail" service of the United States Postal Service, the proliferation of overnight courier services, and the general use and availability of facsimile machines. This technological progress in transportation has also resulted in the increased mobility of the citizens of the several States. It is respectfully submitted that modern technological realities today provide a sound reason for moving the jurisdictional inquiry away from a focus on geographical distances and boundaries and physical contacts to an evaluation and balancing of the substantial relevant interests of the parties and the involved states. See McDougal, *Judicial Jurisdiction: From A Contacts to an Interest Analysis,* 35 Vand. L. Rev. 1 (1982).

In contrast to the minimal inconveniences and burdens upon husband, which might be occasioned by the exercise of California jurisdiction over him, the inconveniences and burdens that would be suffered by the wife and children, if wife is required to litigate the marital issues other than status and custody in New Jersey, are substantial. The children are still of young and tender years (the record indicates that young Ari until recently continued to nurse) and need the constant presence of their full-time custodian and care giver. Clearly, on the record in this case, husband has a higher level of mobility than wife and has established the habit of traveling to California on a regular continuing basis. His resources and the financial benefits he is able to derive from his travels to California make it substantially more fair and reasonable to require him to do whatever traveling may be required by this litigation than to place the burden and inconvenience of periodic travel upon the wife and children.

CALIFORNIA SHOULD BE PERMITTED TO EXERCISE IN PERSONAM JURISDICTION OVER HUSBAND ON THE BASIS THAT IT IS THE STATE OF DOMICILE OF WIFE AND CHILDREN

"Conflicts arising out of family relations raise problems and involve considerations very different from controversies to which debtor-creditor relations give rise. Such cardinal differences in life are properly reflected in law." *New York ex rel. Halvey v. Halvey,* 330 U.S. 610, 616

(1947) (Frankfurter, J., concurring). In criticizing the presence basis of jurisdiction, even Professor Posnak, who coined the phrase "Gotcha" theory of judicial jurisdiction, has recognized that the jurisdictional issues in family law cases should perhaps be treated differently than those in ordinary commercial cases. See Posnak, *A Uniform Approach To Judicial Jurisdiction After World-Wide And The Abolition Of The "Gotcha" Theory*, 30 Emory L. J. 729, n. 4. Indeed, this Court has, traditionally, treated jurisdictional issues in family law cases differently from jurisdictional issues in ordinary commercial litigation. Thus, it is established constitutional law that the state of domicile of either spouse has jurisdiction to alter the marital status, even *ex parte*, including cases in which it could not adjudicate the property interests affecting the absent spouse where constitutional requirements for the exercise of *in personam* jurisdiction over that spouse had not been met. See *Williams v. North Carolina*, 317 U.S. 287 (1942); *Estin v. Estin*, 334 U.S. 541 (1948); *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957).

As noted previously, in *Kulko v. California Superior Court, supra*, this court, for the first time, applied the analytical framework developed in *International Shoe* and its progeny to a family law case. In *Kulko*, the husband and wife separated after some 13 years of marriage and wife moved from New York, the marital domicile, to California. After they had separated, the parties entered into a separation agreement and the wife flew back to New York to finalize and sign the agreement. Immediately thereafter she flew to Haiti and obtained a divorce decree which incorporated the terms of the agreement. She then returned to her home in California and husband,

wife and their children settled into their new marital, custodial, support and property relationships based upon the settlement agreement and the divorce decree. The children continued to reside in New York in the custody of their father and enjoyed visitation with their mother in California, all as provided under the decree and agreement.

Subsequently, after the custody arrangements had been changed by mutual agreement and both children had taken up residence in California with their mother, wife initiated California proceedings wherein she sought to establish the prior divorce decree as a California judgment and to modify the judgment to award her full custody of the children and to increase husband's child support obligations. Husband was not personally served in California with process relating to wife's California proceedings. Indeed, it appears from this Court's opinion that Mr. Kulko had never set foot within the state of California subsequent to the date that he and his former wife were married more than 15 years earlier during a brief stopover in California when he was en route to a tour of military duty in Korea; not even, apparently, during the two year period between the time that his daughter moved to California to live with her mother and the wife instituted the California custody and support proceedings. In fact, husband had apparently been within the state of California only twice in his life, both times during brief military stopovers on his way to and from his military assignment in Korea. Thus, husband's earlier visits to California were fleeting (this court characterized them as "glancing" 436 U.S., at 92), fortuitous and remote

in terms of time and purpose from the family law litigation.

What is significant about *Kulko* is not so much its result of precluding California from exercising jurisdiction over Mr. Kulko under the particular facts and circumstances of that case, as its weighing of those facts and circumstances and its evaluation of the relevant interests and of the quality and nature of the defendant's activities in determining whether the requisite "affiliating circumstances" between the defendant and the forum state were present to a degree sufficient to support the exercise of *in personam* jurisdiction over him. Where the family members had settled comfortably into their new family relationships based upon the prior settlement agreement and divorce decree and where, for some four years, they had all been living their lives under the rules set forth [illegible] decree and agreement, there is nothing surprising or unfair about requiring the party who desires to change those established, judicially confirmed rules of the relationship to bear the burden of whatever inconvenience or expense might result from such post-decree judicial proceedings which were necessary to adjudicate the issues relating to such proposed changes. It is in this context that this Court stated in *Kulko* that "basic considerations of fairness point decisively in favor of appellant's State of domicile as the proper forum for adjudication of this case, whatever the merits of appellee's underlining claim. It is appellant who has remained in the State of the marital domicile, whereas it is appellee who has moved across the continent." 436 U.S., at 97. Also of significance was the fact that the procedures available under the Revised Uniform Reciprocal Enforcement of Support Act of 1968,

permitted the parties to litigate the issues relative to child support without either of them having to leave their state of residence. 436 U.S., at 98-99.

In a post-decree situation like *Kulko*, the original state has a judicial history and record regarding the case. In a case like the present, where no prior adjudication of any issues related to the marital separation has occurred, the judicial slates are clean.

This case involves facts which are very different from the facts in *Kulko* and, thus, call for a different result. Here, husband was personally served with process while he was physically present in California. Moreover, his presence on that occasion and on several other occasions, both before and after service of process on him, can in no sense be characterized as "fleeting", "transitory" or "fortuitous." His presence in California on those several occasions has been both contemporaneous and connected with the litigation commenced by the filing of wife's California Petition. In view of the fact that husband sent his wife and children to their new home in California (this is a fair characterization of the situation in that husband controlled the family funds, purchased the airline tickets that were necessary for his wife and children's transit to California and drove them to the airport on the date of their departure) when he knew that he and wife had mutually agreed to separate, that judicial proceedings were contemplated to resolve the issues incident to that separation and that wife desired to be the plaintiff in divorce proceedings based on the ground of "irreconcilable differences", California's exercise of jurisdiction over him in this case does not offend traditional notions of fair play and substantial justice. To conclude that husband

could not have reasonably anticipated being haled into court in California under the circumstances is to blink at reality. At all relevant times husband was being advised by an attorney as to the family law issues and is presumed to know the law. The law in this country for more than a century has been that service of process upon a non-resident defendant, when he is physically present within the territory of the forum state, is a sufficient basis upon which that State can exercise *in personam* jurisdiction. In fact, the record in this case establishes that husband knew, before he traveled from Los Angeles to Mill Valley, California, in January of 1988, that wife had initiated California separation proceedings and had set in motion procedures to have husband served with process relating to those proceedings. Having actual knowledge of those facts, husband proceeded with his trip to Mill Valley, assumed the risk of being served and, in fact, was personally served with the Petition and Summons. In addition to these facts, wife has previously set forth facts to show that, unlike Mr. Kulko, husband, in the present case, has himself engaged in affirmative activities by which he has " 'purposefully availed' himself of the 'benefits and protections' of California's laws. See *Shaffer v. Heitner*, 333 U.S., at 216, 53 L Ed 2d 683, 97 S. Ct. 2569." *Kulko*, 436 U.S., at 94.

The facts of this case also present a situation which has not previously been presented to this Court in other family law cases such as *Williams v. North Carolina, supra, Estin v. Estin, supra, Vanderbilt v. Vanderbilt, supra,* and *Sherrer v. Sherrer*, 334 U.S. 343 (1948). Here, husband has been personally served with the Petition and Summons in the forum state, has actual notice of the proceedings and,

in fact, has availed himself of the opportunity of being heard in the California courts on the jurisdictional issue. Thus, it is respectfully suggested, this case presents an opportunity for this Court to decide whether it is appropriate to announce a rule that the State of domicile of either spouse has jurisdiction to adjudicate all issues presented in a marital separation proceeding at least where the non-domiciliary and non-resident spouse has been personally served with process within the forum state, where all of the requirements of procedural due process, including actual notice and a reasonable opportunity to be heard, have been met and where there has been no prior adjudication by another forum of any of the family law issues.

> "Domicile creates a relationship to the state which is adequate for numerous exercises of state power. [Citations omitted] Each State as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders. The marriage relation creates problems of large social importance. Protection of offspring, property interests, and the enforcement of marital responsibilities are but a few of the commanding problems in the field of domestic relations with which the state must deal." *Williams v. North Carolina*, 317 U.S., at 298.

It is common knowledge that divorces are increasing in this country. As previously noted, technological progress has resulted in an increase in the mobility of the citizens of this country. Thus, it is not unusual for spouses to wind up in different states after separation but before judicial proceedings relating to that separation

have been commenced. In this case, husband helped create the interstate family relationship. Under the Constitution, the regulation and control of marital and family relationships are reserved to the States and a State has the power to determine the incidents of those relationships in which its domiciliaries are involved. *Sherrer v. Sherrer, supra,* 334 U.S., at 354; *Williams v. North Carolina, supra,* 317 U.S., at 304-305 (Frankfurter, J. concurring). Under the facts and circumstances of this case, why should one separated spouse who chose to stay and begin a new life in familiar surroundings be rewarded while the other separated spouse who chose to travel to another state and begin a new life in a new place be penalized? In our mobile society, moving to a new environment when a marriage breaks up is not a transgression.

The livelihood and support of the wife and children is a problem with which the State of their domicile is properly concerned (*Estin v. Estin, supra,* 334 U.S., at 547) and, where the concerns of procedural due process have been met, such state of domicile should be allowed to adjudicate all of the family law issues incident to the proceeding before it, so that those issues can be comprehensively dealt with rather than requiring the various incidents of a family law cause of action to be chopped up. See *Vanderbilt v. Vanderbilt, supra,* 354 U.S., at 423-435 (Frankfurter, J., dissenting). Such a rule permitting the State of domicile of one spouse, under such circumstances, to adjudicate all of the family law issues would advance the "orderly administration of the laws", limit the piecemeal litigation of family law issues, and lend "a

degree of predictability" and certainty to the jurisdictional inquiry without sacrificing fairness. See *World-Wide Volkswagen, supra,* 444 U.S., at 297.

A DECISION UPHOLDING CALIFORNIA'S POWER TO EXERCISE IN PERSONAM JURISDICTION OVER HUSBAND IN THIS CASE WOULD NOT CONSTITUTE AN UNWARRANTED INTERFERENCE WITH SOCIAL POLICY OF ENCOURAGING VISITATION

The recognized exceptions to the traditional "presence" rule of jurisdiction, i.e., presence induced by fraud and immunity from service when presence is related to participation in litigation within the jurisdiction of the forum, are accommodations of common law as developed within each individual judicial system, state or federal. (See *Wyman v. Newhouse,* 98 F.2d 313 [2 Cir., 1937]; *Lamb v. Schmitt,* 285 U.S. 222 [1931]; *Stewart v. Ramsay,* 242 U.S. 128 [1916] and cases cited therein). So, too, is social policy of encouraging visitation between divorced or separated parents and their children as well as other family law related social policies particularly a matter of state law. Husband appears to recognize this truth in his brief ("All states" recognize a policy of encouraging divorced parents to maintain an ongoing relationship with their children. [Petitioner's Brief on the Merits, page 38]). The regulation and control of marital and family relationships are reserved to the States and this Court has not conceived it to be a part of its function to weigh the policies of the respective states regarding family law matters. *Sherrer v. Sherrer, supra,* 334 U.S., at 354. *Williams v. North Carolina, supra,* 317 U.S., at 303.

> "We are not authorized nor are we qualified to formulate a national code of domestic relations. We cannot, by making 'jurisdiction' depend . . . upon the shifting notions of policy concealed by the cloudy abstraction of 'matrimonial domicile,' turn this into a divorce and probate court for the United States." Id., 317 U.S., at 304-305 (Frankfurter, J., concurring).

The opinions of this Court dealing with parental rights issues and cited by husband at pages 36 and 37 of his Brief on the Merits, all involve the rights and interests of unmarried natural fathers with respect to their illegitimate children (except that in *Michael H. v. Gerald D.*, 109 S. Ct. 233 [1989] the child was not technically illegitimate because it was conceived and born while its mother was married to Michael H.). They all involve situations where the asserted parental rights *as a father* were categorically cut off altogether and, as a result, there would be no contact between father and child. See *Stanley v. Illinois*, 405 U.S. 645 (1972); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Lehr v. Robertson*, 463 U.S. 248 (1983); and *Michael H. v. Gerald D., supra*. Under the facts of the instant case there is no question of husband's parental rights being terminated nor are his rights to visit his children, in fact, being limited.

It is true, as husband correctly sets forth in his Brief on the Merits, that California does have a social policy of encouraging visitation between divorced or separated parents and their children. It is clear from a review of the Authorities cited by husband in his Brief (pages 38, 39) that the California courts have been careful to protect the right of visitation between parents and children and to

foster the visitation policy in appropriate cases. However, it is the law of California, as expressly applied by the courts of that state to this case, that the exercise of *in personam* jurisdiction over husband will not interfere with the social policy of encouraging such visitation (JA 35).

In deciding the jurisdictional issue presented by this case, the Court must focus not only on husband's parental and other rights but also on the important rights of the wife and children. They have a right to a convenient forum in their home state for the resolution of the family law issues affecting their lives as long as, under all of the facts and circumstances of this case, that is not an unfair forum in which to require husband to litigate. They have the right to a stable and nourishing home environment not unnecessarily disrupted by wife's being required to travel between California and New Jersey to litigate the family law issues of this case, either leaving the children behind in the temporary care of a stranger or uprooting them from their normal environment and routine and, in either event, incurring the additional expenses involved.

CONCLUSION

If the requirement of reasonableness is met, measured by the standard of traditional notions of fair play and substantial justice, then California's power to exercise *in personam* jurisdiction over husband under the facts and circumstances of this case should be recognized. For all of the foregoing reasons it is respectfully submitted that the exercise of *in personam* jurisdiction over husband in this case is fair, just and reasonable. Therefore, it is

respectfully requested that this court issue an opinion upholding California's exercise of *in personam* jurisdiction over husband and affirming the Decision of the California Court of Appeal.

Respectfully Submitted,

JAMES O. DEVEREAUX
Attorney at Law
Counsel of Record
for Real Party In Interest
Francie Burnham
in the Supreme Court of
the United States

ROBERT L. NELSON
A Professional Corporation
35 Mitchell Blvd.
San Rafael, California 94903
Trial Counsel
for Real Party In Interest
Francie Burnham

APPENDIX I

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-1522-88T2
A-5705-87T2

DENNIS BURNHAM,

Plaintiff-Appellant,

v.

FRANCIE BURNHAM,

Defendant-Respondent.

ORIGINAL FILED

JUL 24 1989

Argued June 6, 1989 – Decided

Before Judges Antell and Brochin.

On appeal from Superior Court, Chancery Division, Family Part, Sussex County.

Laurence J. Cutler argued the cause for appellant (Cutler & Celli, attorneys' Mr. Cutler, on the brief).

Ann O'Flanagan argued the cause for respondent.

PER CURIAM

Following execution by the parties of a property settlement agreement on July 8, 1987, defendant wife moved

to California with the two children of the marriage. The move was made with the acquiescence of plaintiff husband who, in fact, paid for the cost of transportation. Plaintiff filed his complaint for divorce in New Jersey on October 7, 1987, but did not serve defendant with process at this time. Defendant started suit in California against plaintiff for legal separation, custody and child support on January 5, 1988, and plaintiff was served by mail with the papers in that case on January 24, 1988. He was also personally served while on a business trip in that state.

After being served with the California suit papers, plaintiff, for the first time, made extraterritorial service on defendant of his New Jersey summons and complaint on January 30, 1988.

Plaintiff here appeals from an order dated June 3, 1988, dismissing the complaint which he filed in New Jersey on October 7, 1987. He also appeals from an order dated October 14, 1988, dismissing his second complaint for divorce and incorporation of the property settlement agreement, which he filed after the dismissal of his first complaint. We have consolidated both appeals for the purpose of review.

The determination of the Chancery Division to foreclose plaintiff from pursuing his claim for relief in New Jersey was grounded in the belief that plaintiff had deliberately and unfairly manipulated defendant into moving to California so that he could bring his divorce action in New Jersey where it would be the most convenient for him and most inconvenient for defendant, upon the fact that plaintiff failed to issue his summons within ten days after filing the complaint as required by *R.* 4:37-2(a), upon

considerations arising from the Uniform Child Custody Jurisdiction Act, *N.J.S.A.* 2A:34-35, and upon considerations of *forum non conveniens.*

We affirm both orders under review substantially for the reasons stated by Judge Graves for the Chancery Division, Family Part, in his detailed and comprehensive statement of reasons filed with the order of June 3, 1988.

APPENDIX II

Dennis

12/12 1987

Francie –

I now have a pretty clear idea of my calendar for the first half of '88, so here are my plans for visiting with Rachel & Ari.

Jan 22-24	I'll be in S.F. for the weekend in between business appointments the week before & after. I'll ask Rachel to spend the weekend with me again, and we'll return to Mill Valley Sunday noon.
Feb 12-15	I'm in Dallas while Rachel is out of school. I'm not sure if I can visit Feb 19-21 – I'll let you know.
April 21-24	I'll be in The Bay Area on business. Can I attend Open House at school on Thursday? I'd like to take Rachel with me to

R.D.2 BOX 718A ANDOVER, NJ 07821 (201) 398-7378

Monterey for the weekend.

June 17	My trade show in San Diego ends the same time Rachel's school ends. I want to send an airline ticket for her to fly to San Diego. We'll spend a week together (Disneyland, Knott's Berry Farm, San Diego Zoo, etc.) while driving up the coast. I think we'd be in Mill Valley by June 24 or June 25.
August	Sometime before school starts in the fall I'd like both Rachel and Ari to visit here with me at home; for about 7-10 days. Not sure yet of the dates, but there's plenty of time.

Enclosed is some mail that recently came. I've been forwarding most of your catalogs & magazines.

Happy holidays

Den